Supreme Court, U.S.
FILED
JAN 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-941

# in the Supreme Court of the United States

OCTOBER TERM, 1987

CITIBANK, N.A.,

*Petitioner,*

*v.*

DATA LEASE FINANCIAL CORPORATION, *et al.*,

*Respondents.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For The Eleventh Circuit

## PETITIONER'S REPLY BRIEF IN SUPPORT OF ITS PETITION FOR WRIT OF CERTIORARI

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## SUMMARY OF ARGUMENT

Data Lease's unsupported contention that an individual or entity other than a national bank's board of directors can be ultimately responsible for the bank's management is belied by the National Bank Act and decisions of this Court. Public confidence in national banks depends upon director accountability for bank management. The Eleventh Circuit's decision, which dis-

regards the Act, and rests on inapplicable state law, will dilute director accountability and undermine public confidence in national banks.

The Eleventh Circuit's opinion also is in direct conflict with the Fifth Circuit's opinion in *Empire Life Insurance Co. of America v. Valdak Corp.*, 468 F.2d 330 (5th Cir. 1972), because it suggests that a mere showing of negligence is sufficient for Data Lease's claim under the Uniform Commercial Code ("U.C.C."). Despite Data Lease's assertion to the contrary, it is clear that under *Empire* a *specific intent* to deplete the value of stock collateral is essential to Data Lease's claim. Certiorari therefore should be granted and the Eleventh Circuit's opinion should be reversed.[1]

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[1]Data Lease's statement of the case contains factual misstatements, the most egregious of which must be addressed. There is no support, in the record or elsewhere, for Data Lease's statement that Citibank recommended that Miami National Bank make a series of bad loans that precipitated a decline in the bank's value. Notably, Data Lease does not provide any citation to the record to support its assertion. Citibank could not, and did not, direct the management or the day-to-day affairs of Miami National Bank, but merely exercised its rights under the pledge agreement with Data Lease to vote the pledged shares. The comment of director Stefan that "at the bottom of everything" he worked for Citibank merely reflected the fact that Citibank had the right to vote to maintain him or to remove him from office.

## ARGUMENT

### I. The Eleventh Circuit's Opinion Conflicts with the National Bank Act.

The National Bank Act vests the board of directors of a national bank with the authority and ultimate responsibility to manage the bank. 12 U.S.C.A. §§ 24, 71 (West Supp. 1987). This Court has made it clear that national bank directors may not officiate as "figure-heads" and cannot be absolved of their ultimate responsibility for bank management. *Briggs v. Spaulding,* 141 U.S. 132, 165 (1891). The Eleventh Circuit's conclusion that a pledgee of 80% of a bank's stock, which votes that stock to elect directors, may be held ultimately responsible for the management of the bank is untenable under the Act and ignores a basic principle of the corporate form.

The Eleventh Circuit's decision will undermine the public policy, embodied in the Act, of promoting public confidence in national banks by making directors strictly accountable for bank management. This policy is especially important as confidence in financial institutions is shaken by the recent high rate of bank failures.[2] *See Prudential Trust Co. v. Brown,* 271 Mass. 132, 171 N.E. 42, 44-45 (1930) (bank directors "invite the confidence of the depositing public and must afford the protection thereby implied"). In *Gibbons v. Anderson,* 80 F. 345 (W.D. Mich. 1897), the court, interpreting decisions of this Court, noted the rationale for vesting ultimate responsibility for

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[2]More banks failed in 1987 than in any year since the Great Depression. Miami Herald, Jan. 17, 1988, at 10F, col. 4.

management in the directors and the impact upon public confidence if the law were otherwise:

> How . . . would any national bank have the confidence of its depositors . . . if it were given out that these directors whose names so often stand at the head of its business cards . . . [were merely] makeweights in its solicitation for business . . . .

*Id.* at 350.

Public confidence in the operation of national banks is a key purpose of the statutory framework relating to directors. Congress has promulgated strict standards for membership to a national bank's board of directors, and bank directors are charged with heightened fiduciary duties to the bank's depositors and shareholders. *See* 12 U.S.C.A. §72 (West Supp. 1987); 12 U.S.C.A. §73 (West 1945); *see, e.g., Lane v. Chowning,* 610 F.2d 1385 (8th Cir. 1979). Additionally, the Act holds bank directors ultimately accountable by granting a statutory right of action to persons damaged by a director's breach of his duties. 12 U.S.C.A. §93(a) (West Supp. 1987). The Eleventh Circuit's opinion contradicts the plain language of the Act and undermines the policy behind it by diluting the accountability of directors.

The Eleventh Circuit's application of state law agency principles incorrectly ignores the supervening principles of the Act.[3] Moreover, the law applied by the Eleventh Circuit was incorrect. Although an agency rela-

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[3]Oddly, Data Lease's brief implies that the provisions of the Act were not an important part of the proceedings below. On the contrary, they were key to the threshold issue determined by the district court. A-41, A-60. The Eleventh Circuit, however, erroneously ignored the Act's provisions and applied general state law to reverse the district court's opinion.

tionship may be created by agreement, there can be no agency relationship where a statute requires one personally to perform an act. *See, e.g., Connecticut v. Tedesco*, 175 Conn. 279, 397 A.2d 1352 (1978). The National Bank Act required Miami National Bank's board to manage Miami National Bank; the board members therefore could not have been Citibank's agents in managing the bank.

## II. The Eleventh Circuit's Opinion Is In Direct Conflict With The Fifth Circuit's Opinion In *Empire*.

Data Lease's suggestion that specific intent is not an essential element under the *Empire* decision, and that mere negligence suffices, is astonishing. In *Empire*, the Fifth Circuit specifically recognized that a pledgee of stock does not violate its duty to the pledgor with respect to the underlying value of the stock collateral "if the stock held in pledge suffered a loss in value through negligence of the pledgee . . . through ill-advised or negligent voting of . . . stock . . . ." *Id.* at 335 (quoting *Ritchie v. McMullen*, 79 F. 522 (6th Cir.), *cert. denied*, 168 U.S. 710 (1897)).

The Eleventh Circuit determined that a claim would lie for loss in the underlying value of the pledged stock if there was evidence which indicated that the pledgee "install[ed] and maintain[ed] incompetent individuals in positions of management" or "blithely allowed these individuals to deplete the value of the pledged collateral." A-28-29. The failure to require a *specific intent* by the pledgee to deplete the value of the collateral places the Eleventh Circuit's decision in direct conflict with the Fifth Circuit's decision in *Empire*.

Data Lease argues that even if *Empire* requires "intentional misconduct," there is no conflict with the Eleventh Circuit's decision because Data Lease's as-

serted claims for fraud and conversion, which are intentional torts. The argument is without merit. *Empire* does not permit a cause of action for any alleged intentional misconduct arising in connection with a pledge relationship. The cause of action is limited to instances in which "[the] pledgee use[s] his position . . . as stockholder intentionally to depreciate the stock of his pledgor . . . with the dishonest purpose of acquiring ownership of the stock at forced sale." *Id.* at 336. There is a clear distinction between a laundry list of alleged intentional acts and an allegation that these acts were performed with the specific intent to depreciate the pledged stock.

Additionally, Data Lease incorrectly suggests no conflict exists because the Fifth Circuit applied a rigorous pre-Code evidentiary standard inapplicable under the U.C.C. The more rigorous evidentiary standard referred to by Data Lease was limited to that utilized to determine the validity of foreclosure sales. *Id.* at 333-34. The standard applied to determine whether a pledgee has violated his duty of care remains the same in both pre-Code and U.C.C. cases. *See, e.g., FDIC v. Webb*, 464 F. Supp. 520, 526 (E.D. Tenn. 1978) ("[U.C.C. §9-207] does not alter but merely restates the common law rule"); U.C.C. §9-207, comment 1 (1978).

The Eleventh Circuit's opinion directly conflicts with the Fifth Circuit's opinion in *Empire*. Accordingly, certiorari should be granted.

## CONCLUSION

For the reasons asserted herein, and in Citibank's petition for certiorari, a writ of certiorari should be granted by this Court to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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